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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

STATE OF TENNESSEE,
Petitioner,

v.

JOHN HERRINGTON, Secretary of the United States Department of Energy,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICI CURIAE* IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, when Congress provided in the Nuclear Waste Policy Act of 1982 for the Department of Energy to consult and cooperate with the states with regard to an *authorized* facility for monitored retrievable storage of spent nuclear fuel, the Department of Energy was required to consult or cooperate with the states prior to authorization by Congress?

2. Whether the Department of Energy's interpretation of the Nuclear Waste Policy Act of 1982 was reasonable and consistent with Congress's expressed intent that consideration of a monitored retrievable storage program proceed expeditiously?

IDENTITY AND INTEREST OF *AMICI CURIAE*

This brief in support of respondent Secretary of the Department of Energy is submitted on behalf of Arkansas Power & Light Company, Baltimore Gas & Electric Company, Boston Edison Company, Carolina Power & Light Company, The Cleveland Electric Illuminating Company, Commonwealth Edison Company, Consolidated Edison Company of New York, Inc., Duke Power Company, Duquesne Light Company, Florida Power & Light Company, Indiana & Michigan Electric Company, Iowa Electric Light & Power Company, Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., Kansas Gas and Electric Company, Los Angeles Department of Water & Power, Louisiana Power & Light Company, MSU System Services, Inc., Nebraska Public Power District, Niagara Mohawk Power Corporation, Northeast Utilities, Northern States Power Company, Pennsylvania Power & Light Company, Portland General Electric Company, Public Service Company of Colorado, Public Service Electric & Gas Company, Southern California Edison Company, System Energy Resources Inc., The Toledo Edison Company, Virginia Power, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation (the "Utilities").

The Utilities are public utilities that provide, or intend to provide, nuclear generated electricity to customers throughout the United States. As a result, the Utilities produce spent nuclear fuel as a necessary by-product of the generation of electricity from nuclear power reactors. Eventually this spent nuclear fuel must be disposed of, in accordance with the provisions of the Nuclear Waste Policy Act of 1982. The Act provides that the Department of Energy shall enter into contracts with producers of spent nuclear fuel, such as the Utilities, for disposal of the fuel commencing in 1998.

The Utilities finance the Department of Energy's storage and disposal of their spent nuclear fuel by paying

the Department of Energy a fee on the kilowatt-hours of electricity that are generated and sold from their nuclear power plants. In addition, the Utilities, at their expense, must provide for the storage of their spent fuel until the Department is able to take delivery of it. For these reasons, the Utilities have a significant interest in ensuring that the Department of Energy's program for the construction of facilities for the storage and disposal of spent nuclear fuel proceeds expeditiously and efficiently, so that such facilities become available in timely fashion without unnecessary cost.

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BRIEF OF *AMICI CURIAE* IN OPPOSITION TO CERTIORARI

STATEMENT OF THE CASE

This action arises out of the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 *et seq.* (the "Act"). The Act provides for the transportation, storage and disposal of spent nuclear fuel and high-level radioactive wastes.[1] The Department of Energy ("DOE") is charged with

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[1] For purposes of this brief the term "spent nuclear fuel" will be used to refer both to high-level radioactive wastes and spent nuclear fuel.

implementing the Act by 1) providing disposal facilities for spent nuclear fuel and 2) contracting with the owners and generators of spent nuclear fuel for the disposal of those materials in the DOE facilities. § 111 of the Act, 42 U.S.C. § 10131; § 114 of the Act, 42 U.S.C. § 10134; § 302 of the Act, 42 U.S.C. § 10222. The costs of the program are financed through the assessment of a fee against the owners and generators of spent nuclear fuel, including the Utilities. *See, e.g.*, 111(b)(4) of the Act, 42 U.S.C. § 10131(b)(4); § 302 of the Act, 42 U.S.C. § 10222. The Utilities are paying these fees pursuant to contracts that each of the Utilities must enter into with DOE for the transportation and disposal of its spent nuclear fuel. *See* 10 C.F.R. Part 961 (1986).[2]

The main objective of the Act is to provide for the permanent disposal of spent nuclear fuel in deep geologic repositories. The Act sets forth milestones and schedules for meeting this objective. *See* § 111-125 of the Act, 42 U.S.C. § 10131-10145. Not later than January 31, 1998, DOE is to begin disposing of spent nuclear fuel. § 302(a)(5) of the Act, 42 U.S.C. § 10222(a)(5). DOE, however, recently has announced that construction of the first repository will not commence until 1998 and that the facility will not be ready to receive material until 2003. United States Department of Energy, DOE/RW-0128, *Draft Mission Plan Amendment*, (January 1987).

Fortunately, Congress foresaw that the complexity of the permanent geologic repository program could result in delays beyond 1998 and provided in the Act for temporary storage programs. One type of temporary storage facility envisioned by Congress is the monitored retrievable storage ("MRS") facility, which provides a means of safely storing spent nuclear fuel in a readily retrievable form for further processing and/or disposal. § 141 of the Act, 42 U.S.C. § 10161.

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[2] To date, these fees amount to approximately $2.7 billion and continue to be paid at the rate of over $400 million each year.

Because the concept of an MRS facility was controversial at the time the Act was debated in Congress and because Congress could not predict the need for such a facility, the Act did not authorize the construction of an MRS. Instead Congress directed DOE to submit an MRS proposal to Congress so that Congress could determine, on the basis of full and complete information, whether an MRS should be authorized. § 141(b) of the Act, 42 U.S.C. § 10161(b). The Act required this proposal to include a detailed description of an MRS program including site-specific designs and cost estimates sufficiently detailed to support Congressional authorization and expeditious completion of a facility. § 141(b) of the Act, 42 U.S.C. § 10161(b). Congress also instructed DOE to designate in the proposal at least three alternative sites for construction of an MRS, with DOE's recommendation for the preferred alternative. § 141(b)(4) of the Act, 42 U.S.C. § 10161(b)(4).

DOE attempted to carry out this Congressional mandate by preparing an MRS proposal for presentation to Congress. In April 1985 DOE informed the State of Tennessee of its intention to present a proposal recommending three candidate sites within Tennessee to Congress and provided Tennessee with a draft proposal. At the same time, DOE announced that it intended to present the proposal to Congress in January 1986 and provided Tennessee with opportunities to study, review and comment on the proposal prior to that time.[3]

In August 1985 Tennessee commenced an action in the United States District Court for the Middle District of Tennessee seeking a declaratory judgment that DOE's

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[3] DOE's steps to involve Tennessee in the decision making process included funding a local task force, which held public meetings and work sessions and visited other nuclear waste management facilities. DOE also provided updated information on the MRS proposal to Tennessee as it became available and offered to present Tennessee's comments to Congress in conjunction with the MRS proposal.

proposed presentation to Congress was prepared in violation of the Act. Tennessee also sought to enjoin DOE from presenting its proposal to Congress. Tennessee objected on the grounds that DOE's proposal allegedly was prepared without consultation and cooperation of states, including Tennessee, which were under consideration as MRS sites and, therefore, allegedly violated the provision in the Act that provides for state participation in the MRS process. DOE's position is that the Act specifically provides for cooperation and consultation with the states with regard to the MRS only after such a facility is "authorized" by Congress. *See* 42 U.S.C. § 10161 (h).[4]

On February 5, 1986 the District Court granted summary judgment in favor of Tennessee. *Tennessee v. Herrington*, 626 F. Supp. 1345 (M.D.Tenn. 1986), Appendix C. of Petitioner at 43.[5] On November 25, 1986 the Sixth Circuit overturned the District Court's decision and ruled in favor of DOE. *Tennessee v. Herrington*, 806 F.2d 642

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[4] The Act provides for state participation in the MRS process by incorporating into the MRS provision certain provisions for state participation in the permanent repository program. Subsection 141(h) of the Act states in its entirety that:

> [a]ny facility *authorized* pursuant to this section shall be subject to the provisions of section 115, 116(a), 116(b), 116(d), 117 and 118. For purpose of carrying out the provisions of this subsection, any reference in sections 115 through 118 to a repository shall be considered to refer to a monitored retrievable storage facility.

42 U.S.C. § 10161(h) (emphasis added).

[5] The District Court found that it had original jurisdiction to review DOE's activities under the Act. The Sixth Circuit disagreed, holding that exclusive jurisdiction lies in the United States Courts of Appeals. The Utilities agree with the Sixth Circuit's holding on the jurisdictional issue, which is in accord with earlier decisions of the United States Court of Appeals for the District of Columbia Circuit. *General Elec. Uranium Management Corp. v. DOE*, 764 F.2d 896 (D.C. Cir. 1985); *Wisconsin Elec. Power Co. v. DOE*, 778 F.2d 1 (D.C. Cir. 1985).

(6th Cir. 1986), Appendix A. of Petitioner at 1. The Court ruled that DOE's interpretation of the Act was rational and should be upheld. The Court noted that DOE's interpretation furthers the Congressional goal of speedy resolution of the MRS issue, without depriving the states of meaningful participation in the MRS process. 806 F.2d at 653, Appendix A. of Petitioner at 21-22.

On December 31, 1986 the Sixth Circuit denied Tennessee's Motion for a Rehearing En Banc. On January 7, 1987, however, the Court granted Tennessee's request for a stay of the mandate pending the filing of this Petition. At the present time, therefore, DOE remains unable to present its proposal to Congress.

REASONS FOR DENYING THE WRIT

Review of the Sixth Circuit's decision by this Court is not warranted, because the Sixth Circuit correctly applied the standard for review of an agency decision articulated by this Court in numerous decisions. *See Japan Whaling Association v. American Cetacean Society*, —— U.S. ——, 106 S.Ct. 2860 (1986); *United States v. Riverside Bayview Homes, Inc.*, —— U.S. ——, 106 S.Ct. 455 (1985); *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). DOE is the agency charged with administering the Act and its interpretation of the Act is entitled to deference and should be upheld unless it is in conflict with the express language of the Act or the express intent of Congress. Deference to DOE as the administering agency is especially appropriate with regard to the Act because the Act establishes time limitations that were deemed appropriate to resolve the critical problem of nuclear waste disposal. Litigation about DOE's interpretation of the Act already has begun to have an impact on those time limits. For instance, DOE currently is defending more than forty lawsuits concerning its recommendations for permanent repository sites. *See, e.g.*,

Nevada v. Herrington, No. 84-7846 and consolidated cases (9th Cir. filed December 12, 1984); *Environmental Policy Institute, et al. v. Herrington*, No. 84-7854 and consolidated cases (9th Cir. filed December 18, 1984); *Utah v. DOE*, No. 86-7667 (10th Cir. filed October 2, 1986).

In the instant case, DOE's interpretation of the Act is consistent with the statutory language and is necessary to effectuate the Congressional goals of efficient disposal of spent nuclear fuel and expeditious consideration of the MRS concept. Moreover, DOE's interpretation provides the states with ample means to participate in the waste disposal process. In contrast, the interpretation proposed by Tennessee is contrary to the explicit wording of the Act and would undermine the utility of the MRS program envisioned by Congress.

A. Expeditious Review And Implementation Of The MRS Program Was A Congressional Goal And Is Essential In Light Of Recent Developments In The Permanent Repository Program

Pursuant to the explicit language of the Act, DOE is required to consult and cooperate with states on MRS decisions only after an MRS facility has been "authorized" by Congress pursuant to § 141 of the Act. 42 U.S.C. § 10161(h). Any requirement for state participation prior to that time would defeat the Congressional goal of expeditious considerations of the MRS.

The Act requires that DOE's proposal for an MRS program contain explicit details including site-specific designs and cost estimates and a recommendation for a site location. These details are intended to provide Congress with sufficient information to authorize an MRS facility, as proposed by DOE, and to allow expeditious completion of any facility so authorized. § 141(b) of the Act, 42 U.S.C. § 10161(b). Clearly, such a detailed plan could not be formulated by DOE without extensive studies of a number of potential locations for MRS facilities.

Indeed, in carrying out its task of preparing an MRS proposal, DOE found it necessary to apply site-screening criteria to sites throughout the continental United States. An increasingly intensive review process was undertaken of the eastern central region of the country, then of thirty-seven locations in twelve states within that region, and finally of eleven sites in six different states before selecting three sites in Tennessee.

The degree of detail that Congress requires in the DOE report does not, however, indicate that Congress intended the MRS process to be inordinately slow. To the contrary, the Act specifies that DOE was to present its proposal to Congress on or before June 1, 1985. § 141(b) of the Act, 42 U.S.C. § 10161, a time frame shorter than that for the permanent repository program.[6] This difference is consistent with Congress's determination that the MRS concept is justified, in part, because the availability of an MRS facility would allow DOE more time to study options for permanent repositories and would provide back-up for delays in the permanent repository program. S.Rep. No. 282, 97th Cong., 1st Sess. 63 (1981) (remarks of Sen. Johnston); 128 Cong. Rec. 8525 (1982) (remarks of Rep. Huckaby). The utility of the MRS facility would be severely diminished if the MRS study, authorization, construction and licensing did not proceed in timely manner so that an MRS facility could be completed well before a permanent repository.

Such a delay would be inevitable, however, if DOE were required to engage in extensive consultation with every state under consideration for a site even before Congress has authorized the MRS. Tennessee claims that the Act requires DOE to negotiate separately with each state where a facility is "generally contemplated for study and development by the Secretary for presentation to Con-

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[6] DOE was unable to complete the study and proposal by that date. On June 1, 1985 it notified Congress that it planned to submit the proposal in January 1986.

gress." This interpretation, bereft of any support in the language of the Act, would have required DOE to engage in a time-consuming process of consultation and negotiation with virtually every state other than Alaska and Hawaii before it even could begin to prepare its proposal for Congress.[7] This unmanageable requirement would inevitably contribute substantially to delay in the MRS program.

Moreover, delaying the MRS process could have a devastating effect on the entire nuclear waste program. Since the Sixth Circuit's decision in November 1986, the need for MRS facilities as an integrated part of the nuclear waste program has become even more pressing. In January 1987 DOE issued a revised plan for implementation of the permanent disposal process. United States Department of Energy, DOE/RW-0128, *Draft Mission Plan Amendment* (January 1987). According to that revision, construction of a permanent repository will not commence until 1998 and the facility will not be ready to begin receiving spent nuclear fuel from the Utilities until 2003. *Id.* at 5. The current time frame for permanent disposal is thus five years behind that envisioned by Congress when the Act was promulgated. Notably, the delay is occasioned in large measure by problems in the process of state cooperation and consultation. *Id.* at 5, 6.[8]

This delay in the permanent repository program creates a critical situation for Utilities who need to store the spent nuclear fuel produced by their nuclear power reactors. The contracts that the Act requires utilities to enter into with DOE provide that DOE must begin accepting spent nuclear fuel by January 31, 1998. DOE remains

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[7] At the very least DOE would have been required to negotiate with the twelve states in the preferred region where DOE identified thirty-seven sites.

[8] The Act explicitly provides for consultation and cooperation with the states in considering sites for the permanent repositories. § 116-118 of the Act, 42 U.S.C. § 10136-138. Those provisions are not at issue here.

committed to performing its contractual obligations, but is now relying on its ability to accept waste at an MRS facility by 1998 in order to compensate for the delay in the permanent facility. *Id.* at 5, 10. Consultation and cooperation prior to Congressional authorization with all states studied for the MRS clearly would jeopardize DOE's ability to complete an MRS facility before 1998 and to honor DOE's contractual and statutory commitment to begin disposing of spent nuclear fuel by that date. Thus DOE's interpretation of the state participation provisions in the Act not only is rational, but is necessary to ensure the continued effectiveness of the nuclear waste program.

B. Under DOE's Interpretation Of The Act The States Retain Meaningful Participation In The MRS Process

DOE's interpretation of the Act undeniably limits the degree to which states must participate in the preliminary stages of the MRS process more than Tennessee would like. As the Sixth Circuit held, however, "[i]t does not totally deprive the state of its role in the MRS siting process." 806 F.2d at 653, Appendix A. of Petitioner at 22.

Indeed, Tennessee already has had significant participation concerning the MRS. DOE solicited comments from Tennessee and provided Tennessee with current information about the developing MRS proposal. DOE also offered Tennessee financial assistance. To date, Tennessee has had almost two years since DOE published its draft proposal, in April 1985, and well over one year since DOE completed its proposal in December 1985, to study and comment on the plan. Tennessee obviously will have further opportunities to participate, such as the ability to participate in Congressional consideration of the DOE proposal, including the submission of comments on the proposal. When and if Congress approves the MRS proposal and authorizes an MRS facility, the state in which the facility will be located will have in-

put into a number of key issues through the consultation and cooperation process required for authorized MRS facilities. These issues include, but are not limited to, concerns relating to construction, the environment, public health and safety, operations and transportation. DOE would be required to consult and cooperate with the state on all of these issues and to attempt to enter into an agreement with the state. Furthermore, the Act provides that funds would be provided to the state to mitigate the impact of construction and operation of the facility. § 141(f) of the Act, 42 U.S.C. § 10161(f).[9] Finally, if Congress authorizes the MRS, the state may participate in the licensing proceeding for the facility before the Nuclear Regulatory Commission, and in the preparation of any environmental impact statement. § 141(c)(2) and (d) of the Act, 42 U.S.C. § 10161(c)(2) and (d).

This clearly would constitute substantial state involvement in the MRS process, without contravening the Congressional intention that the MRS proposal be presented as soon as possible. Thus DOE's interpretation strikes an appropriate balance between the need for efficiency and expediency and the need for state participation in the process. In sum, it is reasonable and should be upheld.

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[9] Significantly, no funds were authorized for review of a *prospective* site; such payments are to be made only "upon receipt by the Secretary of *congressional authorization* to construct a facility." § 141(f) of the Act, 42 U.S.C. § 10161(f) (emphasis added). This limitation on the use of federal funds does not apply to the permanent disposal facilities; funds are provided for states being *considered* as a permanent repository site. § 116(c)(1)(A) of the Act, 42 U.S.C. § 10136(c)(1)(A).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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